S.R.K. TRADING SDN. BHD.

v.

CITY ONE SDN. BHD. & ANOR.

HIGH COURT, KUALA LUMPUR
DATO' ANUAR BIN DATO' ZAINAL ABIDIN J.
[CIVIL SUIT NO. S1-22-262-92]
17 AUGUST 1993

PRACTICE AND PROCEDURE: Application for summary judgment - Striking out claim - Plain and obvious case - Construction of document - Question of law involved.

CONTRACT: Whether defendants are partners - Individual or separate sale and purchase agreements - Breach of contract - Period within which obligation to be fulfilled - Whether agreement is a brokerage or estate agent agreement.

WORDS AND PHRASES JUDICIALLY DEFINED: "Practice" - Valuers, Appraisers & Estate Agents Act 1981, ss. 2, 22.

On 26 March 1990 the 1st and 2nd defendants entered into an agreement to promote and develop a project called Menara City One (Joint Venture Agreement). On 9 August 1990 the 1st defendant entered into an agreement with the plaintiff (option agreement) wherein the 1st defendant reserved for the plaintiff 224 units of apartments and 8 units of penthouses to be constructed in the said project. The plaintiff paid RM232,000 being RM1,000 per unit to the 1st defendant.

On 31 January 1992 the 1st defendant's solicitors wrote to the plaintiffs' solicitors giving notice that the sales launch of Menara City One had taken place on 28 January 1992. On 15 February 1992 the plaintiff's solicitors wrote requesting for 232 sets of sale and purchase agreements. On 11 March 1992 that 1st defendant's solicitors wrote to say that they had no instructions to act on behalf of the 1st defendant in respect of the 232 units and that the necessary sale and purchase agreements had not yet been prepared.

On 13 April 1992 the 1st defendant informed the plaintiff that they had until 4.30 p.m. on 27 April 1992 to execute the sale and purchase agreements and pay the 10% deposit. The plaintiff contended that the 90 days would only commence from the date on which the sale and purchase agreements were made available for execution. The plaintiff was unable to pay the full amount in time. The 1st defendant rejected all payments and forfeited the moneys paid under the option agreement.

The plaintiff applied for summary judgment under O. 81 of the Rules of the High Court 1980 for specific performance. The 1st defendant applied to strike out the plaintiff's claim pursuant to O. 18 r. 19 of the Rules of the High Court 1980.

Held:

[1] Having considered all the surrounding circumstances of the case and viewed the evidence in its totality, including the provision of the joint venture agreement and the conduct of the defendants, the 1st and 2nd defendants are partners in the development, promotion and sale of the project in question. The defendants have not raised a triable issue on the question of partnership. If follows that each of the defendants as partners is liable for the debts and liabilities incurred by the other partner in the course of the partnership.

[2] Construing the option agreement (as amended) as a whole, the plaintiff was well within its contractual rights to insist on entering into individual or separate sale and purchase agreements in the statutory form with the 1st defendant.

[3] It follows that the 1st defendant is not in law and upon a proper construction of the option agreement as amended permitted to insist that the plaintiff take all the 232 units or face forfeiture of RM232,000 paid by the plaintiff under the option agreement. Since the 1st defendant terminated the option agreement on this ground, such termination amounts to wrongful repudiation and breach of contract on its part.

[4] Having read the correspondence that passed between the parties at the material time in their totality and having regard to the terms of the contract in question, the 1st defendant has acted in breach of its obligations under the option agreement as amended. It is clear that the plaintiff was under a duty to perform its obligations, namely to sign the sale and purchase agreements within 90 days of receiving written notice from the 1st defendant of the approval of the building plans or within 90 days from the date on which the 1st defendant launched its sales. The undisputed evidence establishes that the plaintiff was at all times ready, willing and able to perform its

obligations under the option agreement as amended. However the 1st defendant was intent on placing all sorts of obstacles and finding ingenious reasons for reneging on its obligations.

[5] The option agreement (as amended) when construed as a whole does not constitute a brokerage or estate agency agreement. Under the option agreement the plaintiff had acquired proprietary rights on its own behalf and has not acted as an estate agent. The option agreement, when construed as a whole entitled the plaintiff to purchase all 232 units for itself. There is no commission or brokerage whatsoever involved in the transaction.

[6] The word "practice" requires some continuous activity. There is no evidential backing at all to indicate, even sightly, of such practice.

[7] A Court ought not to strike out a writ or pleading save in plain and obvious cases. So long as there is some cause of action disclosed which is not frivolous or vexations the pleading ought not to be struck out although the Court is of the view that the plaintiff may not succeed at trial.

[8] If a defendant raises a question of law on a summary application which is clear and unarguable, the Court is entitled to deal with it and if it is answered in favour of the plaintiff, then to give judgment accordingly.

[Plaintiff's application allowed with costs. First defendant's application dismissed with costs].

Cases referred to:

Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd. [1987] CLJ 246 / [1987] 2 MLJ 183 at 185 ***(foll)***

Bank Negara Malaysia v. Mohd. Ismail & Ors. [1992] 1 CLJ 627 / [1992] 1 MLJ 400 at 408 ***(foll)***

Mooney & Ors. v. Peat Marwick & Mitchell & Co. & Anor. [1967] 1 MLJ 87 ***(cit)***

Loh Holdings Sdn. Bhd. v. Peglin Development Sdn. Bhd. & Anor. [1984] 2 CLJ 88 / [1984] 2 MLJ 105 ***(cit)***

Raja Zainal Abidin v. British American Life & General Insurance Berhad [1993] 3 CLJ 606 **(cit)**

Alloy Automative Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd. [1986] 1 CLJ 2 / [1986] 1 MLJ 382 ***(cit)***

Aw Yong Wai Choo & Ors. v. Arief Trading Sdn. Bhd. & Anor. [1991] 3 CLJ 2834 / [1992] 1 MLJ 166 ***(foll)***

Esso Standard Malaya Bhd. v. Southern Cross Airways (M) Bhd. [1972] 1 MLJ 168 ***(foll)***

Fadzil bin Mohamed Noor v. Universiti Teknologi Malaysia [1981] CLJ 85 / [1981] 2 MLJ 196 ***(foll)***

Raymond Banham & Anor. v. Consolidated Hotels Ltd. [1976] 1 MLJ 5 ***(cit)***

Chung Khiaw Bank Ltd. v. Hotel Rasa Sayang Sdn. Bhd. & Anor. [1990] 1 CLJ 675 / [1990] 1 MLJ 356 ***(cit)***

Smith v. Anderson [1880] 15 ChD 247 ***(cit)***

Hindustan Steel Ltd. v. The State of Orissa AIR [1970] SC 253 ***(cit)***

Luxor (Eastbourne) Ltd. v. Cooper [1941] AC 108 ***(cit)***

Legislation referred to:

Partnership Act 1961, ss. 3, 4

Rules of the High Court 1980, O. 18 r. 19, O. 81

Valuers, Appraisers and Estate Agents Act 1981, s s. 2, 22

For the plaintiff - G. Sri Ram; M/s. Sri Ram & Co.

For the 1st defendant - Haji Mohamed Ismail bin Mohamed Shariff; M/s. Mohamed Ismail & Co.

For the 2nd defendant - S. Nantha Balan; M/s. Shook Lin & Bok

JUDGMENT

Anuar bin Dato' Zainal Abidin J:

Background

These are two summonses, one taken out by the plaintiff for specific performance under O. 81 of the Rules of the High Court 1980 (which is Encl. (14) in the Court file) and the other taken out by the 1st defendant to strike out the plaintiff's action herein pursuant to O. 18 r. 19 of the Rules of the High Court 1980 and/or under the Court's inherent jurisdiction. The 2nd defendant did not file any separate application. Nor has it filed any affidavit supporting or opposing either application. However, it has supported the 1st defendant's application by way of written submission.

Both summonses came on for hearing in Chambers before Mr. Ee Chin Seng JC on 16 March 1993 and by consent, the learned Judicial Commissioner gave directions for the parties to put in their written submissions within specified dates. This was done and the matter came up before me on 5 August 1993 for mention. By this date the learned Judicial Commissioner had gone on transfer. Counsel for the plaintiff, the 1st and 2nd defendants respectively agreed that I should deal with and dispose of this matter. All Counsel concerned informed me that they had nothing further to add by way of oral argument to the written submissions that had been filed. Accordingly, I reserved judgment to enable me to consider the pleadings delivered by the parties, the affidavit evidence filed by them and the written submissions that they have put in.

Facts

The 2nd defendant to this action is the Datuk Bandar of Kuala Lumpur and is by statute a

corporation sole. The 1st defendant is a licensed housing developer.

On 26 March 1990 the 1st and 2nd defendants entered into an agreement entitled "Joint Venture Development Agreement" (which I shall refer to as "the joint venture agreement" in this judgment) pursuant to which they agreed to promote and develop a project called Menara City One. This project comprises of two parcels of land which are described as Parcel A and Parcel B respectively in the joint venture agreement. Parcel A comprises of three pieces of land held under three separate titles while Parcel B consists of some pieces of land on which stand buildings known as Selangor and Malayan Mansion. Parcel A is owned by the 2nd defendant. Under the terms of the joint venture agreement the 2nd defendant agreed to acquire the ownership and possession of Parcel B.

The joint venture agreement divides the development of Parcel A into two phases. The 1st phase encompasses two residential tower blocks of about 500 units and 1 office block, together with a multi-storeyed car park and a hawker centre. The 2nd phase comprises the development of a residential tower block of about 508 units and includes a 2-level podium block of commercial space and an underground car park.

On 9 August 1990 the 1st defendant entered into a written agreement (which I shall refer to as "the option agreement" in this judgment) with the plaintiff under which, for a total consideration of RM232,000 being RM1,000 per unit paid by the plaintiff, the 1st defendant reserved for the plaintiff 224 units of apartments and 8 units of penthouses to be constructed on Phase 1 of the project. I will deal with some of the main features of the option agreement later in this judgment. The option agreement was subsequently amended by the parties. The plaintiff paid the sum of RM232,000 to Messrs. Zain & Co. who were acting as solicitors for the 1st defendant.

By a letter wrongly dated 7 January 1991 (it should have been dated 7 January 1992) solicitors for the 1st defendant advised the plaintiff's solicitors that the building plans for Lot 29 (which forms part of Parcel A) had been approved by the 2nd defendant on 20 December 1991. On 28 January 1992, an advertisement was inserted in the newpapers of that date announcing the launch of the project. The correspondence from the 1st defendant's solicitors preceding this advertisement does not contain any reference or information about the launching of the project. However, on 31 January 1992 the 1st defendant's solicitors wrote to the plaintiff's solicitors giving notice that the sales launch of Menara City One had taken place on 28 January 1992. This letter also required all potential purchasers introduced by the plaintiff to be directed to the 1st defendant's sales office.

On 15 February 1992, the plaintiff's solicitors wrote requesting for 232 sets of sale and purchase agreement and stating that these would be returned after execution together with the 10% deposit. On 11 March 1992, the 1st defendant's solicitors wrote informing the plaintiff's solicitors that they had no instructions to act on behalf of the 1st defendant in respect of the 232 units and that the necessary sale and purchase agreements had not yet been prepared. At this juncture, it is necessary to bear in mind that the sale and purchase agreements in question are in statutory form prescribed by the Housing Developers (Control and Licensing) Regulations 1989.

There then followed an exchange of correspondence and on 13 April 1992, the 1st defendant's solicitors wrote setting out terms and conditions on which the sale was to be conditioned. In the same letter it was stated that the plaintiff had until 4.30 p.m. on 27 April 1992 to attend at the 1st defendant's solicitors' office to execute the sale and purchase agreements together with a bankers draft for the 10% deposit. This date was ascertained by the 1st defendant as 90 days from 28 January 1992, being the date on which the project was launched. The plaintiff's solicitors in their correspondence took the stand that the 90 days would only commence from the date on which the sale and purchase agreements were made available for execution.

Under cover of 3 letters all dated 27 April 1992, the plaintiff sent three separate sums totalling RM3,086,000 to the 1st defendant's solicitors. According to the affidavit of Surjit Raj dated 26 May 1992, filed on the plaintiff's behalf, the amount required to be paid was RM4,352,000 which the plaintiff was unable to raise in the time afforded to it. By letter dated 28 April 1992, the 1st defendant's solicitors rejected the tender of payment and forfeited the monies paid under the option agreement.

On 26 May 1992 the plaintiff issued a writ accompanied by a statement of claim against

the defendants claiming specific performance, declaration and an injunction. On 3 June 1992, the plaintiff obtained an *ex-parte* injunction restraining the defendants from selling, transferring, encumbering pledging or disposing off the 232 units in question. The injunction continues to subsist and there has been no application made to discharge it. On 10 September 1992 the plaintiff took out Encl. (14) asking for summary judgment and on 19 November 1992, the 1st defendant took out Encl. (24).

The foregoing facts and chronology are not in dispute.

Preliminary

Before I proceed to deal with the several matters raised by the parties, it is necessary for me to address myself to some preliminary matters.

For purpose of convenience only, I propose to deal with the application under O. 81 first and then deal with the application to strike out. I have adopted this course because I am of the view that if I hold that there are triable issues, that finding would dispose of both applications altogether. In such circumstances, I would be obliged to grant the defendants unconditional leave to defend and at the same time refuse their application to strike out the writ.

Secondly, I have to bear in mind the principles governing applications made under order 81. In essence, these principles are the same as those governing applications made under O. 14 for summary judgment except that under O. 81 the Court is empowered to grant specific relief summarily. The philosophy underlying applications for summary judgment has been clearly stated in two decisions of the Supreme Court.

In *Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd.*, [1987] 2 MLJ 183 at 185 Hashim Yeop A. Sani SCJ (as he then was) said:

> The underlying philosophy in the O. 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.

Later, in *Bank Negara Malaysia v. Mohd. Ismail & Ors.*, [1992] 1 MLJ 400 at 408 Mohd. Azmi SCJ in delivering the majority judgment of the Supreme Court said:

> In our view, basic to the application of all those legal propositions, is the requirement under 0.14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court.On the treatment of conflict of evidence on affidavits, Lord Diplock speaking in the Privy Council on *Eng Mee Yong & Ors v. Letchumanan* had this to say at page 217:
>
> > Although in the normal way it is not appropriate for a Judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be .

Although Lord Diplock was dealing with an application for removal of caveat in that particular case, we are of the view that the above principle of law is relevant and applicable in all cases where a Judge has to decide a case or matter on affidavit evidence.

Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the Judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is ahdered to, a Judge is in no position to exercise his discretion judicially in an O. 14 application. Thus, apart from identifying the issues of fact or law, the Court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the

> Court should exercise its duty under O. 14. If the legal point is understood and the Court is satisfied that it is unarguable, the Court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'. (See *Cow v. Casey* [1949] 1 All ER 197 and *European Asian Bank AG v. Punjab & Sind Bank* [1983] 2 All ER 508 at 516).

These decisions are plainly binding on me and I propose to approach the application in Encl. (14) for summary judgment guided by the principles enunciated in these two cases.

Thirdly, in relation to the application to strike out the plaintiff's writ, I take the principles governing the matter as well settled. A Court ought not to strike out a writ or pleading save in a plain and obvious case. So long as there is some cause of action disclosed which is not frivolous or vexatious the pleading ought not to be struck out although the Court is of the view that the plaintiff may not succeed at trial. In performing this task, the Court is entitled to scrutinize any evidence filed to ascertain whether the action is bound to fail. This review is usually undertaken by the Court when exercising its inherent jurisdiction. The foregoing principles are to be distilled from the decisions in *Mooney & Ors. v. Peat Marwick & Mitchell & Co. & Anor.* [1967] 1 MLJ 87, *Loh Holdings Sdn. Bhd. v. Peglin Development Sdn. Bhd. & Anor.* [1984] 2 MLJ 105 and the recent decision of the Supreme Court in *Raja Zainal Abidin v. British American Live & General Insurance Bhd.* [1993] 3 CLJ 606.

Partnership

In the statement of claim and in the affidavit in support of the summons for summary judgment, the plaintiff contends that the 1st and 2nd defendants are partners in the development and promotion of the project in question. The defendants have denied this in their respective defences although there is no specific denial of this allegation in the 1st defendant's affidavit in reply. The plaintiff has seized upon this failure on the part of the 1st defendant to specifically deny the existence of a partnership in its affidavit and has submitted that this allegation had gone unrebutted. In support of this contention the plaintiff has relied on the decision of the Federal Court in *Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.* [1986] 1 MLJ 382

In my judgment nothing turns on the 1st defendant's failure to specifically rebut the allegation of partnership in its affidavit. The issue has been raised by denial in its defence and I do not think that the ends of justice would be met by the plaintiff attempting to take advantage of this failure by the 1st defendant. I accept the submission of the 1st defendant (contained in paragraph 4 of its written submission dated 10 May 1993) that it has sufficiently denied that the defendants are partners in law.

Nevertheless, it is necessary for me to test the evidence placed before me and to ascertain whether a triable issue on this point has been raised. Before I do this, it is necessary for me to direct myself on the relevant law that is applicable to the subject at hand.

A partnership has been defined by s. 3 (1) of the Partnership Act 1961 as follows:

> Partnership is the relation which subsists between persons carrying on business in common with a view of profit.

Section 4 of the Partnership Act 1961, lays down certain rules to enable a Court to determine whether a partnership does or does not exist. That section provides as follows:

> In determining whether a partnership does or does not exist, regard shall be had to the following rules:
>
> (a) joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not shares any profits made by the use thereof;
>
> (b) the sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived;
>
> (c) the receipt by a person of a share of the profits of business is *prima facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular -
>
> (i) the receipt by a person of a debt or other liquidated amount, by instalments or otherwise, out of the accruing profits of a business does not of itself make him a partner in the business or liable as such;

(ii) a contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such;

(iii) a person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt, a partner in the business or liable as such;

(iv) the advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits, arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such:

Provided that the contract is in writing and signed by or on behalf of all the parties thereto; and

(v) a person receiving, by way of annuity or otherwise, a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not, by reason only of such receipt, a partner in the business or liable as such.

These provisions were considered by Peh Swee Chin J. (as he then was) in the case of *Aw Yong Wai Choo & Ors. v. Arief Trading Sdn. Bhd. & Anor.* [1992] 1 MLJ 166. The relevant part of the headnote of that case (which accurately summarises the crucial passages in the judgment) reads as follow:

(2) A partnership did exist between the defendants as found from all the evidence. To find the existence of a partnership, the Court must find the real intention of the parties in dispute or involved. The real intention is not necessarily the expressed intention of the parties so that even if the parties express that they are partners, the court may decide to the contrary after the court considers all relevant facts taken together. The stated rules in s. 4 of the Partnership Act, 1961 regarding the determination of whether a partnership does or does not exist cannot be exhaustive at all.

(3) The relevant factors to be taken together for consideration are those happenings of the relation between the parties, that is, all the relevant incidents of the incident, including any written or verbal agreement, the conduct of the parties at all times, and all surrounding circumstances.

In arriving at his conclusion on the partnership point in that case, Peh Swee Chin J. examined a number of authorities which I do not propose to review here. Instead, I am content to apply the tests laid down by the learned Judge to the facts of the present case.

In order to determine whether there is a triable issue on the question of partnership, I have considered all the surrounding circumstances of the case and viewed the evidence in its totality, including the provisions of the joint venture agreement and the conduct of the defendants. Having done so, I am satisfied that the 1st and 2nd defendants are partners in the development, promotion and sale of the project in question. I have not been driven to my conclusion by any single factor or circumstances but by the totality of the circumstances.

There are several factors indicating a partnership. For example, there is provision for the sharing of profits. Clause 2.05 of the joint venture agreement which governs the distribution of profits provides as follows:

> The net profits before tax arising from the Development of Parcel A shall be distributed between the parties hereto by the Developer in the proportion of the 30% to Datuk Bandar and 70% to the Developer to be distributed the following year after audit. The net profit shall be determined by an independant auditor approved by the Datuk Bandar. It is agreed that if there is any loss it is to be borne solely by the Developer without effecting the entitlement of the Datuk Bandar The Developer shall guarantee a minimum profit of 2 million ringgit to Datuk Bandar or 30% of the audited profit whichever is greater based upon the plans and number of units in Schedule A being approved for Development by Datuk Bandar and the relevant Authorities.

Another indication is to be found in clauses 1.02 and 1.05 of the joint venture agreement which squarely places the financial responsibility for the project solely on the 1st defendant as developer.

Further, under clause 5.03 of the joint venture agreement, the 2nd defendant is required to provide vacant land as its contribution for the project, while under clause 5.01 the 2nd defendant has agreed to be a party to the sale and purchase agreement in the form prescribed by

the Housing Developers (Control and Licensing) Regulations, 1989. Clause 4.14 of the joint venture agreement makes the 1st defendant solely responsible for damage to third parties. Clause 5.06 requires the 2nd defendant to give and render such general assistance and do all such acts and things as may from time to time be required by the 1st defendant as developer in connection with any of the matters provided for in the agreement.

Clause 3.01 which is another significant provision states as follows:

> Immediately prior to the first sale of the said residential/commercial units in the Development, the Datuk Bandar shall open an account (hereinafter referred to as the "Said Account") with any bank or financial institutions acceptable to the Developer for the purposes of depositing progressive payments received from individual purchase *(sic)* of the residential/commercial units in the Development. The said account is to be operated solely by the Datuk Bandar specifically for the Development and not otherwise and the Datuk Bandar hereby agrees not to utilise, spend or otherwise deal with the money inside the said account or any part thereof other than for the development. Provided always that the developer shall at all times have access to and a right of inspection of the same.

This clause obviously confers upon the 2nd defendant the right of control over monies received from sales of units in the project.

In the newspaper advertisement published on 28 January 1992, Menara City One (which is the project in question) is described as a joint venture project between the 1st and 2nd defendants. Further, the title page of the sale and purchase agreement in the form required by the Regulations also contains a statement that Menara City One is a joint venture project between the 1st and 2nd defendants.

I remind myself that I have not been influenced by any one of the foregoing matters taken in isolation but have addressed my mind to all the circumstances of the case, including the provisions of the joint venture agreement in order to ascertain the intention of the parties.

Looking at the matter as a whole and having come to the conclusion that the defendants are partners, I find the bare denial of the defendants in their respective defences unconvincing. In my judgment, the defendants have not raised a triable issue on the question of partnership. In view of my finding that there is a partnership, it follows that each of the defendants as partner is liable for the debts and liabilities incurred by the other partner in the course of the partnership.

Breach of contract

This is a case where the plaintiff claims that the defendants are in breach of contract whilst the defendants claim *inter alia,* it is the plaintiff who has acted in breach of contract. For the purposes of the application under O. 81 it is therefore necessary for me to examine the undisputed evidence and in particular the contemporaneous correspondence passing between the parties to determine whether there is a triable issue on this point.

I begin therefore by examining the respective obligations of each party to the option agreement in relation to the allegations of breach made on either side. In order to do this, it is necessary to examine the breach alleged by the defendants. My reason for adopting this approach is that once I find that the defendants have raised an arguable or triable issue on the question of breach of contract I am not obliged to proceed any further except to give them unconditional leave to defend.

In order to appreciate the defendants' contention I can do no better than reproduce paragraphs 5 (b) to (i) of the affidavit of Zainon bte Zainal Abidin affirmed on 16 October 1992 and filed in opposition to the O. 81 application. These paragraphs state as follow:

> 5 (b) Pursuant to the said Agreement as varied by letter dated 7 November 1990 exhibited as "SRK-3" in Raj's 1st affidavit, "The purchaser or individual purchaser shall sign the sale and purchase agreement with the developer within Ninety (90) days of receiving the written notice from the developer of the approval of the building plans from the date of launching of the sales whichever is latter failing which the developer shall be entitled to terminate the agreement".
>
> (c) The building plans were approved on 20 December 1991 and the launching of sales was on 28 January 1992
>
> (d) The plaintiff therefore had 90 days from 28 January 1992 to procure the Individual purchasers to sign the sale and purchase agreements and pay the 10% deposit. The plaintiff was informed of the same by letter dated 31 January 1992 exhibited as "SRK-18" in Raj's 1st affidavit.

(e) The plaintiff at all material times was aware they had until 27 April 1992 to procure the individual purchasers to execute the sale and purchase agreement and pay the 10% deposit.

(f) The plaintiff in attempting to comply with the said agreement had on 27 April 1992 forwarded some banker's drafts and cheques to the 1st defendant's solicitors Messrs. Zain & Co. through their solicitors. The letters enclosing the said banker's drafts and cheques are exhibited as "SRK-27", "SRK-28" and "SRK-29" in Raj's 1st affidavit.

(g) The plaintiff, however, failed to perform the said agreement as a whole in that they failed to procure the execution of the sale and purchase agreement for all the 232 units and pay the full 10% deposit by 27.4.92.

(h) The 1st defendant was therefore entitled to and did lawfully terminate the said Agreement. The 1st defendant through their solicitors had by letter dated 28 April 1992 given notice of termination of the said agreement. The said letter is exhibited as "SRK-30" in Raj's 1st affidavit.

(i) I am advised by the 1st defendants solicitors and verily believe that the plaintiff cannot obtain specific performance of an agreement which was lawfully terminated due to the plaintiff's failure to perform the said agreement.

The foregoing paragraphs of the affidavit make it clear that the 1st defendant has sought to justify the termination of the option agreement principally on the ground that the plaintiff had failed within 90 days from 28 January 1992, to procure the **individual purchasers to sign** the sale and purchase agreements and pay the 10% deposit. The defendants' complaint is that the plaintiff in making payment of the sum of RM3,086,000 on 27 April 1992, did not constitute performance of its obligations under the option agreement. It is therefore necessary for me to examine the option agreement as amended to determine what the obligation of the plaintiff is under its terms and to ascertain whether the 1st defendant has raised a triable issue on the question of the plaintiff's alleged breach of contract.

The relevant obligation is to be found in the amended clause 7(a) of the option agreement which reads as follows:

> The purchaser or individual purchaser shall sign the sale and purchase agreement with the developer within Ninety (90) days of receiving the written notice from the developer of the approval of the building plans from the relevant authorities or 90 days from the date of launching of the sales whichever is later failing which the developer shall be entitled to terminate the agreement by a notice in writing to the purchaser. Upon termination that portion of the deposit paid under clause 3 as represents the unsold units (i.e. Ringgit One Thousand (RM 1,000) per unit) shall be forfeited to the Datuk Bandar Kuala Lumpur and the Datuk Bandar Kuala Lumpur shall be entitled to retain the said portion of the deposit for its own use and benefit and be at liberty to sell or otherwise dispose of the remaining units at such price and in such manner to such person as the developer may think fit without being liable to the purchaser for any profit made on such sale or dealing.

It is significant that the clause begins with the words "The Purchaser or Individual Purchaser". This, in my judgment, gives the plaintiff a choice or option. The plaintiff is entitled to enter into and execute the sale and purchase agreements in the statutory form in its own name or it has the choice of nominating individual purchasers to do this. The clause does not, on a plain reading of it, entitle the 1st defendant to insist that the plaintiff should procure individual purchasers to enter into statutory sale and purchase agreements with the 1st defendant; neither is there a duty imposed upon the plaintiff by the option agreement to procure individual purchasers to enter into and execute such agreements. In this context, it is to be noted that in the option agreement the plaintiff is described as the purchaser and that expression is to include the plaintiff's nominee or assigns.

Construing the option agreement (as amended) as a whole I am unable to accept the contention advanced by the 1st defendant in paragraph 5(e) of its affidavit that I have reproduced earlier in this judgment. The plaintiff was well within its contractual rights to insist on entering into individual or separate sale and purchase agreements in the statutory form with the 1st defendant.

The next point raised by the 1st defendant is that set out in paragraph 5(g) of its affidavit which I have reproduced earlier in this judgment. The 1st defendant's contention is that the plaintiff failed to perform the option agreement as a whole by failing to procure the execution of sale and purchase agreements for all 232 units and to pay the full 10% deposit by 27 April 1992.

The plaintiff's answer to this contention is that upon a true construction of the option agreement as amended, there is no obligation on the part of the plaintiff to proceed with the purchase of the entire 232 units. The plaintiff contends that it is a sufficient performance of its obligations under the option agreement for it to pay the 10% deposit on some but not necessarily all of the 232 units. Implicit in this argument, it would seem, is the concession by the plaintiff that the 1st defendant is entitled to forfeit the RM1,000 in respect of each unit over which the option is not exercised.

These rival contentions raise a pure point of construction of the option agreement as amended. This, of course, is a question of law and I have to decide whether the 1st defendant is entitled to unconditional leave by raising this issue. I consider it to be settled law that a court is entitled to deal with a question of law, including a construction of documents, on an application for summary judgment [See *Esso Standard Malaya Bhd. v. Southern Cross Airways (Malaysia) Bhd*] [1972] 1 MLJ 168. Accordingly, I think that I am entitled to deal with the question of construction raised by the 1st defendant and dispose of it in the exercise of my summary jurisdiction.

Construing the option agreement (as amended) as a whole, I am inclined to accept the submission made by the plaintiff. Clause 7(a) which I have reproduced earlier in the judgment on its true construction does not, in my judgment, require the plaintiff to complete purchase (in the sense I have referred to earlier in this judgment) of all the 232 units. That clause on its proper construction gives the parties the liberty to transact sales and purchases between themselves of any number of units up to a maximum of 232. If the plaintiff exercises its option to purchase only, say, 100 units, then the parties are obliged to complete the statutory schedule of payments in respect of those 100 units only. The 1st defendant would then be entitled to treat the option agreement as at an end in respect of the remaining 132 units and it would be at liberty and perfectly within its rights to dispose of these 132 units to anyone it chooses. This, in my judgment, is the true meaning of Clause 7(a) when read as a whole.

It follows that the 1st defendant is not in law and upon a proper construction of the option agreement as amended permitted to insist that the plaintiff take all the 232 units or face forfeiture of the RM232,000 paid by the plaintiff under the option agreement. Since the plaintiff terminated the option agreement on this ground, such termination, in my judgment, amounts to a wrongful repudiation and a breach of contract on its part. The 1st defendant ought to have accepted the 10% paid by the plaintiff in respect of the 167 residential units and the 2 penthouses amounting to the sum of RM3,086,000 as performance of the plaintiff's obligation in respect of these units. Thereafter, the 1st defendant would have been within its legal rights to have forfeited the balance of the RM232,000 in its hands in respect of the units over which the plaintiff had chosen not to exercise the option which it had. As I have said, the 1st defendant did not do this but instead totally rejected the payment and held the plaintiff in default which it was not entitled to do.

For the reasons I have given, I am satisfied that the plaintiff has established that the 1st defendant acted in breach of contract for which the 2nd defendant as its partner is equally liable.

Ordinarily, what I have dealt with would have been an end of the matter. However, that is not so in this case because the plaintiff is asking in its statement of claim for specific relief in respect of all the 232 units. I have therefore to go on and consider whether the plaintiff is entitled to specific performance summarily in respect of all the 232 units.

This brings me to the question as to whether the 1st defendant had acted in breach of contract in fixing the time within which the plaintiff had to exercise its option. I remind myself that if this question involves any serious issues that require trial I must grant the defendants unconditional leave to defend.

In order to deal with this point it is necessary to recapitulate some of the salient facts and circumstances, none of which are in dispute between the parties.

It is to be borne in mind that on 7 January 1992, the 1st defendant's solicitors wrote a letter informing the plaintiff that the building plans had been approved. The 1st defendant being a licensed housing developer is subject to the provisions of the Housing Developers legislation which, among other things, as I have pointed out earlier, provides for a statutory form of an agreement that a developer is mandatorily expected to enter into with a purchaser.

In the plaintiff's several letters to the 1st defendant written after 7 January 1992, the plaintiff requested for the sale and purchase agreements. I think it is sufficient if I reproduce just one of these, namely the plaintiff's solicitors' letter dated 15 February 1992. It is as follows:

217679/C/BIR
2320/DY/90/J

15 February 1992

Messrs. Zain & Co.,
Advocates & Solicitors,
6th & 7th Floors,
Bangunan Dato' Zainal,
23, Jalan Melaka,
50100 KUALA LUMPUR

BY HAND

Dear Sirs,

Agreement dated 9 August 1990 between
City One Sdn. Bhd. & SRK Trading Sdn. Bhd.

We refer to the above subject matter and your letter dated 20 January 1992.

Please note that due to an oversight on our part we failed to note the amendment which were done by letter. The agreement and the amendments are still binding on both your and our client and the parties are bound by it. We therefore do not agree to paragraph 2 of your letter dated 20 January 1992.

We also refer to your letter dated 31 January 1992.

You are no doubt aware that we act for SRK Trading Sdn. Bhd. Our client will be buying the 224 units of apartments and the 8 units of penthouses (totalling 232 units) itself. In view of this we have been instructed to request from you as solicitors for the developer, 232 sets of the sale and purchase agreement. Out client will after execution return the said 232 sets of the agreement together with 10% deposit, after which you are to return them to us after they have been executed by your client.

We hope you will impress upon your client to expedite the matter.

Thank you.

Yours faithfully,
Yusuf Jargit Chow & Co.

c.c. Client

J/la

The 1st defendant's solicitors' letter in reply dated 11 March 1992 may be described as somewhat surprising in its contents. It is as follows:

(ON THE LETTERHEAD OF ZAIN & CO.)

Your Ref: 2320/DY/90/J
Our Ref: 217679/C/BIR

11 March 1992

Tuan,

Per: Agreement dated 9 August 1990
City One Sdn. Bhd. & SRK Trading Sdn Bhd

Your letter dated 15 February 1992 refers.

Kindly be informed that todate we have no instructions to act on behalf of City One Sdn Bhd with regards to the said 232 units of apartments and that the necessary sale and purchase agreements have not as yet been prepared.

As you require the same urgently we are instructed to inform you that City One Sdn. Bhd have no objection to your preparing the draft agreements on behalf of your client provided the same is forwarded to the developer for their approval.

Please, note that as such we do not permit the use of Zain & Co.'s name on the agreement.

Yang benar,
(Sgd.)

M/s. Yusuf Jargit Chow & Co.,
Advocates & Solicitors
Suites 1504 - 1505
15th Floor Campbell Complex
Jalan Dang Wangi
50100 Kuala Lumpur

A R Registered

c.c. Client

BIR/AHI

However, on 13 April 1992, the 1st defendant's solicitors wrote as follows:

(ON THE LETTERHEAD OF ZAIN & CO.)

Your Ref: 2320/DU/90/J
Our Ref: 217679/C/BIR

13 April 1992

Tuan,

Per: Sale and Purchase of Menara City One,
Block B Apartments
Jalan Munshi Abdullah
Kuala Lumpur

We have the pleasure to advise you that we have been appointed solicitors for the vendor

of the abovementioned property. Please be informed that the enclosed blank sale and purchase agreement can be made ready for immediate execution upon receipt from you of the particulars of the parcel number and purchase price for each units to be purchased.

Please note that the sale is subject to the following terms and conditions:

(a) that a Banker's Draft made payable to Datuk Bandar Kuala Lumpur (DBKL) Bank Bumiputra Malaysia Berhad Account No. 054 1233 663 for the 10% Deposit be delivered to DBKL's representative at our office within fourteen (14) days from the date hereof;
(b) that the Schedule H Sale and Purchase Agreement and Memorandum of Transfer of Land (NLC Form 14A) be executed and delivered to us within fourteen (14) days from the date hereof;
(c) that your clients' duly appointed attorney do execute the said documents at our offices in your presence;
(d) that there be no subsequent sale or assignment of the apartment without our client's written consent;
(e) that any housing loan to be obtained from the Government of Malaysia, State Government in Malaysia, any statutory authority which provides loan facilities or from a bank, finance company, building society or any such financial institution be approved within two (2) months from the date of receipt of the stamped sale and purchase agreement;
(f) that a loan agreement and deed of assignment be executed within fourteen (14) days from the date of approval of any housing loan;
(g) that all payments of the purchase price under the Third Schedule of the Sale and Purchase Agreement shall be by Banker's Draft made payable to the abovementioned Datuk Bandar Kuala Lumpur account save the last 5% which is to be paid to us as stakeholders;
(h) that no caveat be registered on the land save for purposes of obtaining a housing loan;
(i) that no renovation may be undertaken without our client's written consent; and
(j) as are contained in the said sale and purchase agreement.

Should there be any breach of the aforementioned terms and conditions, the sale shall be automatically annulled and all payments forfeited.

We also refer to paragraph 5 of your letter dated 2 April 1992 received by our client on 9 April 1992. As your clients are well aware, launching of sales was held on 28 January 1992. Therefore your clients have until 4.30 p.m. on 27 April 1992 to attend at our office to execute the necessary sale and purchase agreements and immediately thereupon surrender the said Banker's Draft for the 10% deposit. Your contention that time against your clients will only start running from the date of supply of the agreement is without basis and rejected by our client.

Enclose please also find 2 duly stamped copies of the supplementary agreement dated 13 November 1992 for your records.

Should any further assistance be required, please do not hesitate to contact us at the abovementioned address.

Yang benar
(Sgd.)

M/s Yusuf Jargit Chow & Co.,
Suites 1504-1505
15th Floor, Cambell Complex
Jalan Dang Wangi
50100 Kuala Lumpur

Urgent Despatch

BIR/AHI

Having read the correspondence that passed between the parties at the material time (including the letters I have set out in this judgment) in their totality, and having regard to the terms of the contract in question, I am left in no doubt that the 1st defendant acted in breach of its obligations under the option agreement as amended. It is clear that the plaintiff was under a duty to perform its obligation, namely to sign the sale and purchase agreements, within 90 days of receiving written notice from the 1st defendant of the approval of the building plans or within 90 days from the date on which the 1st defendant launched its sales.

Although the building plans were approved on 20 December 1991, the 1st defendant did not give notice of this fact to the plaintiff until 7 January, 1992. Two days later, the plaintiff requested for the sale and purchase agreements. The agreements were not furnished by the 1st defendant and instead there was a declaration by the 1st defendant's solicitors in the correspondence I have referred to earlier to the effect that they had no instructions in respect of the sale and purchase agreements. There was then a *volte face* by the 1st defendant's solicitors and an imposition of new terms and conditions.

In my judgment, the undisputed evidence establishes that the plaintiff was at all times ready, willing and able to perform its obligation under the option agreement as amended. However, the 1st defendant was intent on placing all sorts of obstacles and finding ingenious reasons for reneging on its obligations. As a licensed housing developer, it was the duty of the 1st defendant to furnish the plaintiff with the sale and purchase agreements once they were called for. If the 1st defendant had done this within the 90 days, the plaintiff would have been in breach of its contractual obligations if it had failed to execute the agreements and to pay the 10% under each of them. However, in the train of events that I have set out, these things did not happen because the 1st defendant never furnished the agreements. As a licensed housing developer, I do not see what great difficulty the 1st defendant would have been labouring under to produce these agreements which are in any event in a statutory form. The details to be filled in in that form were solely within the knowledge of the 1st defendant and there should not have been the procrastination that occurred.

For the reasons I have given, I am, after a careful examination of all the documentary evidence that has been produced before me, which is really all that really exists in this case, satisfied that the defendants have raised no triable issue in regard to the question under consideration.

Accordingly, the plaintiff, in my judgment, has established a breach of contract for which it is *prima facie* entitled to specific relief unless there exist any other grounds for my granting unconditonal leave. I say this because there is one other issue raised by the defendants which I am obliged to deal with and in doing so if I find that upon that question there is an arguable or triable issue, then, despite all that I have said earlier, the defendants would be entitled nevertheless to unconditional leave to defend. I now turn to deal with that issue which appears from the written submissions from both sides to be the substantial point on which the application to strike out has been based and the application for summary judgment has been resisted.

The Estate Agency Point

The main thrust of the defendant's case is that the option agreement (as amended) upon its true construction is a brokerage or agency agreement under which the plaintiff provides the services of an estate agent or broker for the sale of the units in question and receives a commission for such services. The defendants argue that the plaintiff does not have a licence issued pursuant to the Valuers, Appraisers & Estate Agents Act 1981 and is therefore carrying on business as an estate agent in breach of written law. The defendants go on to contend that in the circumstances the option agreement is unlawful and/or illegal and/or void so that the plaintiff cannot recover any benefits under it. These contentions are be discerned from paragraphs 4 to 8 of the affidavit of Zainon bte Zainal Abidin affirmed on 18 November 1992, in support of the summons to strike out the action (Encl. (24)) and from her affidavit affirmed on 16 October 1992 (wrongly dated as 16 October 1991) filed in opposition to the summons for judgment under O. 81.

It is clear that the defendants rely on the construction of the relevant agreement to support the issue which they advance as entitling them to either unconditonal leave to defend or to have the action struck out. The point taken by the defendants is a question of law turning as it does on the construction of a document. On the state of the authorities as I find them, I am entitled to deal with and dispose of a question of law summarily. If a defendant raises a question of law on a summary application which is clear and unarguable, the Court is entitled to deal with it and if it is answered in favour of the plaintiff, then to give judgment accordingly. (See *Fadzil bin Mohamed Noor v. Universiti Teknologi Malaysia* [1981] 2 MLJ 196).

Before I construe the option agreement as amended, it is necessary to examine the provisions of the Valuers, Appraisers and Estate Agents Act 1981 (which I will refer hereafter in this judgment as "the Act"). The relevant sections are ss. 22B(1) and 22C(1) of the Act. They provide as follows:

> 22B. Estate Agency practice
>
> (1) Subject to the provisions of this Act, a registered estate agent who has been issued with an authority to practise by the Board shall be entitled to practise his profession and shall be authorised to undertake estate agency practice including negotiations for sales, purchases, lettings and leasings by agreement or tender.
>
> 22C. Restrictions on estate agency practice
>
> (1) No person shall unless he is a registered estate agent -

(a) Practise or carry on business or take up employment as an estate agent under any name, style or title containing the words "Estate Agent", "House Agent", "Property Agent", "Land Agent", or the equivalent thereto, in any language which or bearing any other word whatsoever in any language which may reasonably be construed to imply that he is a registered estate agent;
(b) Use or display any sign board, card or other device representing or implying that he is a registered estate agent;
(c) undertakes any of the work specified in s. 22B; or
(d) be entitled to recover in any Court any fees, charges or remuneration for any professional advice or services rendered as an estate agent.

To summarise the position, s. 22B(1) entitles an authorised person to practise as a registered estate agent. Section 22C(1)(c) prohibits any person from undertaking any work specified in s. 22B unless he is a registered estate agent.

Further, s. 2 of the Act defines "estate agency practice" as follows:

> 'estate agency practice' means acting or holding oneself out to the public as ready to act, for reward, as an agent in respect of the sale or other disposal of land and buildings and of any interest therein or the purchase or other acquisition of land and buildings and of any interest therein or in respect of the leasing or letting of land and buildings and or any interest therein;

From a reading of the foregoing provisions, it is obvious that it is only one who undertakes an estate agency practice who is caught by the provisions of the Act. It is therefore necessary for me to determine whether the plaintiff, by reference to the terms of the option agreement as amended, is brought within the provisions of the Act. If on the undisputed documents and facts I so find, then I will have to strike out the statement of claim as being frivolous and vexatious, for it is settled law that on such a finding being made, the plaintiff is bound to fail in the action. (See *Raymond Banham & Anor. v. Consolidated Hotels Ltd.* [1976] 1 MLJ 5; *Chung Khiaw Bank Ltd. v. Hotel Rasa Sayang Sdn. Bhd. & Anor.* [1990] 1 MLJ 356).

In support of the submission that the option agreement is in reality a brokerage or agency agreement, the 1st defendant in its written submission has relied on clauses 5 and 6 of that agreement. These clauses provide as follows:

> 5. The sale and purchase agreement shall be signed direct between the Developer and the Individual Purchaser and shall be at the purchaser's selling price and the developer agrees and undertakes to sign the sale and purchase agreement at the purchaser's selling price. The sale and purchase agreement shall be in the form as prescribed in schedule H of the Housing Developers (Control and Licensing) Act 1966 (hereinafter referred to as "the said regulations").
>
> 6. Upon signing of the sale and purchase agreement at the purchaser's selling price and upon receipt of the progress payment from the individual purchaser in accordance with the said sale and purchase agreement, the developer shall retain the amount which the developer would have received had the property been sold at the developer's selling price and pay the difference between the purchaser's selling price and the developer's selling price (that is, the excess) to the purchaser within thirty (30) days from the date of receipt of such progress payment.

The 1st defendant in its written submission has argued that on a plain and ordinary construction of these 2 clauses it is clear that the intention of the plaintiff from the outset was to seek buyers for the units, sell the units at prices fixed by it and collect the difference by way of brokerage or commission. On the other hand, the plaintiff in its written submission has referred to clauses 4., 5 and 6 of the agreement and argued that on a true construction of the option agreement it is the plaintiff who is the actual purchaser of the units in question having the unfettered right to deal with or dispose of any of those units over which they exercise their option. I think it is necessary for me to reproduce clause 4 of the agreement for the sake of completeness. That clause provides as follows:

> 4. The purchaser shall have the right to sell, assign or transfer any or all of the said units to other individual purchasers and or its nominees (hereinafter referred to as "the said Individual Purchasers") at such price as the purchaser may at its absolute discretion deem fit (hereinafter referred to as "the Purchaser's selling price").

The plaintiff further argues that on a true construction of the option agreement it is open to the plaintiff to purchase any of the units for

its own use or to sell any of them as it deems fit or even to rent or lease them out.

Having considered the matter most carefully and having regard to the submissions made by all parties (including the 2nd defendant), I am inclined to accept the submission made on behalf of the plaintiff.

In my judgment, the option agreement (as amended) when construed as a whole does not constitute a brokerage or estate agency agreement. I am of the view that under the option the plaintiff has acquired proprietory rights on its own behalf and has not acted as an estate agent. The option agreement, when construed as a whole, entitles the plaintiff to purchase all 232 units for itself. There is no commission or brokerage whatsoever involved in the transaction. By reason of what I have said, I am constrained to reject the defendants' contentions and hold that there has been no contravention whatsoever of the Act by the plaintiff.

This in effect concludes the matter against, the defendants and in the plaintiff's favour. However, in deference to the industry of Counsel and the submissions they have advanced I nevertheless propose to deal with the question as to what the Act strikes at.

In my judgment, to bring the case within the relevant provisions of the Act (to which I have referred earlier) there must be some evidence, sufficient at least to raise a triable issue to warrant unconditional leave to defend, of an estate agency practice. The word "practice" which appears in the Act, in my judgment, requires some continuous activity (See *Smith v. Anderson* [1880] 15 ChD 247; *Hindustan Steel Ltd. v. The State of Orissa AIR* [1970] SC 253 and *Luxor (Eastbourne) Ltd. v. Cooper* [1941] AC 108). There is no evidential backing at all to indicate even slightly of such practice.

Conclusion

There is nothing to warrant a trial of this action. No triable issues have been raised by the defendants. Accordingly, I enter judgment in favour of the plaintiff as prayed in its summons (Encl. (14)) and equally, I hereby dismiss the 1st defendant's summons to strike out the plaintiff's action.

The plaintiff will have the costs of both applications.

UNITED ASIAN BANK BHD.

v.

DYALCHANDS SDN. BHD. & 3 ORS.

HIGH COURT, KUALA LUMPUR
DATO' DR. ZAKARIA BIN MOHD. YATIM J.
[SUIT NO. D4-22-440-89]
17 AUGUST 1993

GUARANTEE: Appeal against grant of summary judgment against guarantors - Whether there was demand and/or proper demand - Letters of demand purportedly sent by plaintiff's solicitors - Whether valid - Whether notice of demand properly served - Non-compliance with terms of letter of guarantee - Letter of guarantee requiring service of notice of demand by post - Notice of demand served by hand - Whether valid service - Charging of penalty interest - Whether permissible - Whether guarantors required to be notified of change in rate of interest - Guarantors signing three different guarantee agreements at different times - Whether they were continuing guarantees - Whether guarantors liable on all the agreements.

The plaintiff offered banking facilities to the first defendant upon the request of all the defendants. The second, third and fourth defendants were at all material times directors of the first defendant and had each executed three sets of letters of guarantee in favour of the plaintiff. On the first defendant defaulting in the payment of instalments, the plaintiff filed a claim against the guarantors. The plaintiff obtained summary judgment and the guarantors appealed.

The guarantors argued that the letters of guarantee made it mandatory for the notice of demand to be signed by an officer of the plaintiff, and as the letter of demand was in fact written by the solicitors for the plaintiff, there was no demand and/or proper demand by the plaintiff. The guarantors further contended that although the letters of guarantee provided for a specific mode of service, namely by post addressed to the guarantors, the plaintiff had purpotedly sent the letters of demand by hand. The guarantors submitted that they were entitled to insist on a rigid adherence to the terms of their obligation.

The guarantors also argued that the plaintiff had charged penalty interest although there was no agreement between the plaintiff and the defendants for the charging of such interest. The guarantors further alleged that the plaintiff was enforcing against the guarantors in